United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1221

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1221

UNITED STATES OF AMERICA,

Appellee,

-vs.-

CHARLES LUCCHETTI,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District Of New York

BRIEF IN BEHALF OF APPELLANT

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BRIEF IN BEHALF OF APPELLANT

Preliminary Statement

The defendant-appellant, Charles Lucchetti, appeals from a judgment of conviction entered on May 23, 1975, after a jury trial before the Honorable Jack B. Weinstein, D.J., in the United States District Court for the Eastern District of New York.

On June 15, 1971, an indictment was filed, charging

the defendant and two others, David Williams and Jack Dempsey, with the December 21, 1970 robbery of the Community Branch of the First National Bank of Bayshore, in Bayshore, Long Island. On July 20, 1971, a superseding indictment (A. 12) was filed.

Each of the defendants was named in the three counts of the superseding indictment. Count I charged Bank Robbery by Force and Violence (18 U.S.C. § 2113 [a]); Count II charged Bank Robbery with the Use of a Dangerous Weapon (18 U.S.C. § 2113 [d]); and Count III charged Conspiracy (18 U.S.C. § 371).

On August 2, 1971, upon motion of the United States Attorney, the cases against Williams and Dempsey were severed and the trial commenced as to Lucchetti. Williams and Dempsey testified as government witnesses, and both inculpated Lucchetti. The trial concluded with a jury verdict of guilt as to Counts II and III.

On October 15, 1971, the trial judge, the Honorable Jacob Mishler, sentenced Lucchetti to a term of imprisonment of twenty years and imposed cumulative fines of $15,000.00. (A. 2-3).

On June 12, 1972, this Court affirmed the judgment of conviction, without opinion (A. 15). On November 6, 1972, the Supreme Court of the United States denied a petition for a writ of certiorari (A. 16).

By motions served and filed on February 23, 1973, Lucchetti moved the Court for a reduction of sentence. (A. 17).

Following oral argument on March 2, 1973, the motion for a reduction of sentence was denied (A. 28-34).

By motion returnable August 1, 1974, Lucchetti, pro se, moved the District Court for a new trial (28 U.S.C. § 2255) and for a disqualification of Judge Mishler from further presiding in the matter (A. 35-89). Judge Mishler refused to disqualify himself. On December 16, 1974, following an evidentiary hearing, Judge Mishler granted the petition, vacated the judgment of conviction, and granted a new trial (A. 108).*

Prior to trial, Lucchetti moved, inter alia, for an order suppressing certain alleged admissions made by him to government representatives during the period which followed the entry of the prior judgment and for an order dismissing the indictment due to delay in prosecution (A. 109-119; see also: Supplementary Motions at A. 209-213; A. 214-15; A. 216-19; A. 223-230; A. 231-236; A. 237-242).**

In a Memorandum of Decision and Order, Judge Mishler denied Lucchetti's motion that Judge Mishler disqualify himself from further proceedings (A. 205-208). In another Memorandum

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* During the period between the vacation of the judgment and the commencement of pre-trial proceedings, Lucchetti was released on bail. While on bail, he was declared a fugitive, but thereafter surrendered himself and proceedings continued.

** The various grounds of the supplementary motions will, where relevant, be discussed hereinafter.

of Decision and Order, dated May 12, 1975, following an evidentiary hearing, Judge Mishler denied Lucchetti's motion that alleged admissions be suppressed (A. 243-265). In a third Memorandum of Decision and Order, dated May 12, 1975, Judge Mishler denied all of Lucchetti's pending motions except to the extent consented by the government, but permitted Lucchetti to proceed pro se with the assistance of assigned counsel (A. 266-277).

On May 12, 1975, the re-trial commenced before Judge Mishler (A. 7). On May 13, 1975, Judge Mishler declared a mistrial due to prejudicial testimony elicited by the government (A. 7). On May 15, 1975, Judge Mishler transferred the matter for trial to the Honorable Jack B. Weinstein (see: Judge Mishler's Memorandum to Judge Weinstein at A. 278-281).

On May 19, 1975, Judge Weinstein denied motions by Lucchetti to dismiss the indictment, but granted a motion to re-open the hearing (commenced before Judge Mishler) with respect to suppression of admissions. At the conclusion of the hearing on that day, Judge Weinstein denied the motion to suppress (A. 8). Trial was commenced on May 20, 1975, and concluded with a verdict of guilty as to Counts I, II and III on May 22, 1975.

On May 23, 1975, Judge Weinstein sentenced Lucchetti to serve the same prison term (with credit for time already served) and to pay the same fine, as had been imposed by Judge Mishler in the original judgment of conviction, supra, p. 2). (A. 8). Therafter, Judge Weinstein

denied several post-trial motions for a vacation of judgment (A. 357).

Questions Presented for Review

1. Was the defendant deprived of his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel, as well as his right to due process of law, when the District Court admitted into evidence alleged admissions of the defendant?

A. Should the defendant's admissions have been excluded from evidence because they were the product of an intentional suppression of evidence by the prosecution at his earlier trial?

B. Should the admissions have been excluded from evidence because they were secured from the defendant under circumstances which reasonably led him to believe that they would never, in fact, be used against him?

C. Should the admissions have been excluded from evidence because the government secured them from him pursuant to a promise which the government did not subsequently keep?

D. Should the admissions have been excluded from evidence because of the totality of coercive circumstances which surrounded them?

2. Did the trial court err in not placing the voluntariness of the admissions before the jury in compliance with the requirements of 18 U.S.C. § 3501(a)?

3. Was the defendant deprived of his right to due process of law and was 28 U.S.C. § 455 (as amended December 5, 1974), violated when Judge Mishler refused to disqualify himself for prejudice upon the defendant's motion?

4. Did Judge Mishler's refusal to disqualify himself, and Judge Weinstein's reliance upon Judge Mishler's findings with respect to the defendant's admissions, render a nullity the hearing which Judge Mishler commenced and which Judge Weinstein concluded?

5. Was the defendant wrongfully deprived of his Sixth Amendment right to subpeona witnesses and documents?

6. Did the prosecutor improperly place her own credibility in issue during her summation to the jury?

7. Were the witnesses Dempsey and Williams improperly permitted to invoke their privilege against self-incrimination, and should their testimony have been stricken?

8. Did the government fail to prove the use of a dangerous weapon, as required by 18 U.S.C. § 2113 (d)?

9. Was the defendant deprived of a speedy trial and of a prompt disposition by virtue of the prosecution's suppression of evidence which delayed his ultimate trial by almost four years?

10. Was the government without jurisdiction to prosecute the defendant since the government does not have a sufficient nexus with the Federal Deposit Insurance Corporation?

11. Should the defendant's conviction have been vacated on various grounds set forth in the defendant's post-trial motion in arrest of judgment?

12. Did the trial court have jurisdiction to pass upon the defendant's post-trial motions?

Statement of Facts

A. Preliminary Note.

Lucchetti is proceeding in this Court in forma pauperis and has been assigned counsel pursuant to the Criminal Justice Act. In an effort to give some coherency to the numerous pleadings which have been filed in this case, they are, for the most part, reproduced in the Appendix which is filed with this Brief. In order to prevent the Appendix from being of prohibitive size, the transcripts of the various hearings, the aborted trial, and the final trial have not been reproduced in the Appendix, except to the extent of reproducing the proceedings of the final trial from the Court's charge to the jury through to termination. All of the transcripts of proceedings have, however, been docketed to this Court. Counsel has taken the liberty of binding them into 3 consecutive volumes, and has index tabbed the volumes, where appropriate, so as to facilitate this Court's references to those transcripts.

The proceedings before Judge Weinstein (suppression hearing and trial) are consecutively numbered. Reference to them will be indicated by the prefix "W" followed by the page number. All other references are to proceedings before Judge Misnler, and will be indicated by date of transcript, and page number (E.g.: 5/2/75, p. 38).

The appellant and the government will provide this Court with their respective exhibits, as deemed appropriate or as requested by this Court.

B. The Facts of the Alleged Crime.

On December 21, 1970, a car drove up to the Community Branch of the First National Bank of Bayshore, in Bayshore, Long Island, and two persons wearing ski masks entered the Bank. One of them exhibited a gun. They directed the Bank personnel and customers to lie on the floor, and then hurriedly commenced a search of the premises for money. They exited the Bank with a total of $25,197.74. (W. 103-181; testimony of Frederick Badenious - Bank Auditor, David Gierasch - Head Teller, John F. Sable - Bank Messenger).

Some five months later, David Williams and Jack Dempsey were apprehended during a robbery of the same bank. On or about May 19, 1971, Williams confessed to the December 21 robbery and inculpated the defendant in that robbery.

W.

It was the prosecution's theory of the case, placed in evidence by the testimony of Dempsey (who testified for the prosecution) and Williams (who was called by the defendant) that the defendant had: planned the robbery, supplied the gun, and waited in his car for the robbers at a side road, where he relieved them of the money. The money was allegedly counted at his home later in the day and was divided among them over the following weeks. (Dempsey testified at W. 182-374 and Williams testified at W. 508-569).

The government sought to further connect the defendant with the robbery by proof that (1) the defendant's wife had been employed by the Community Branch of the Bank

for a seven month period which ended more than two and one-half years prior to the robbery (W. 110-111) and (2) the defendant and his wife maintained a safe deposit box at the Bank which the defendant visited on a few occasions during the month and a half preceding the robbery (W.112 - 114).

In addition, over the objection of the defendant, the government was permitted to place in evidence the defendant's alleged admissions made during the period between the first trial and Judge Mishler's order vacating the judgment resulting from that trial (testimony of F.B.I. Agent Daniel E. Long [W. 375-410; 417-422]; Lucchetti grand jury testimony [W. 410-417]; testimony of former Assistant United States Attorney Emmanuel A. Moore [W. 458-485]).

C. The Suppressed Evidence.

The suppression of evidence by the prosecutor and by the F.B.I. during the course of the first trial forms the foundation for much of what will be argued in this Brief, and goes beyond the question decided by Judge Mishler when he set that judgment of conviction aside. As noted by Judge Mishler, in his Memorandum and Order setting aside the conviction, the accomplice Dempsey testified as a government witness. On cross-examination, he denied that the government had made any offers to him or had granted him any leniency in exchange for his testimony (A. 92-94). That trial concluded with a jury verdict against the defendant on August 5, 1971 (A. 2). On or about July 22, 1974,

Lucchetti moved the District Court, inter alia, for a vacation of judgment and for a new trial pursuant to 28 U.S.C. § 2255, claiming that Dempsey's above noted denials were false, that the government knew they were false, and that the trial judge knew they were false (A. 35-46). In support of his assertion with respect to the trial judge, Lucchetti quoted from the January 7, 1973 sentence proceedings of Dempsey in which Judge Mishler told Dempsey: "I just want you to know that the United States Attorney has fulfilled his promises." (A. 95)*. As a result of the defendant's motion, it was discovered that Dempsey's Legal Aide attorney had been a witness to promises made to Dempsey prior to the defendant's trial. Thus, Judge Mishler found, inter alia, that the following facts were true:

> "In the presence of Special Agent Dan Long, [Assistant United States Attorney] Moore [the prosecutor at the first trial] advised [Dempsey's Legal Aide attorney] ... [t]hat if Dempsey cooperated and testified before the grand jury and later testified at the trial charging Lucchetti with armed robbery, Moore would make the cooperation known to the sentencing judge and would also recommend to the Chief of

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* In his opinion granting the § 2255 motion, Judge Mishler acknowledged the personally accusatorial nature of Lucchetti's claim, but denied the apparent implications of the sentencing statement (A. 95-6).

> the Criminal Division that Dempsey be permitted to plead to the conspiracy count in the indictment (Count III). Moore indicated further that Dempsey's cooperation would be known to the District Attorney of Suffolk County, who was in charge of the State prosecution against Dempsey, and that an effort would be made to see that Dempsey's State Court sentence ran concurrently with the Federally imposed sentence." (A. 103-104).

Judge Mishler further found:

> "Assistant United States Attorney Moore knew, or should have known, that Dempsey's answers to the questions concerning the understanding between him and the government were false." (A. 105).

Concluding that "The only question is whether the testimony was false and whether Moore realized it to be false" (A. 106), that "[t]he government's case depended almost entirely upon the testimony of Dempsey" (A. 107), Judge Mishler vacated the judgment of conviction as having been secured in violation of due process (A. 108).

The defendant had been in custody from the time of the filing of the indictment in this case. Since he was not able to make bail, he remained in custody through the first trial and through the course of the subsequent appellate proceedings.

D. The Defendant's Alleged Admissions.

Following the vacation of the defendant's initial conviction, it became clear that the government intended to re-try the defendant and intended to use against him certain

admissions which he allegedly had made to government representatives during the time that his case had been on appeal.

1. The F.B.I. Reports.

Appended to a government affidavit in opposition to Lucchetti's motion to suppress the alleged admissions was a series of F.B.I. reports and letters from Lucchetti to the F.B.I. relating to events which occurred between November 1, 1971(less than a month after the jury's verdict at the first trial) and October 19, 1972 (while the petition for a writ of certiorari was still pending). During this period of time, the Federal authorities had transferred Lucchetti to the Suffolk County, New York Jail for the disposition of State charges pending against him. Those documents show the following:

On September 3, 1971, F.B.I. Agents Long (supra) and Achenbach sought to interview the defendant at the Federal House of Detention in New York, and he declined their overtures (A. 132).*

On March 20, 1972, while at the Suffolk County Jail, Lucchetti wrote to Agent Achenbach claiming that conditions at the Jail violated his civil and constitutional rights (A. 133). On March 27, 1972, F.B.I. agents interviewed

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* There is no indication that any effort was made to secure the permission of Lucchetti's attorney before the effort was made to interview him.

him with regard to his complaints. (A. 134).

On May 31, 1972, Lucchetti wrote to Agent Achenbach requesting another interview concerning his complaints (A. 137). On June 5, 1972, Agents Achenbach and Long interviewed Lucchetti at the Suffolk County Jail. During the course of the interview, Lucchetti mentioned that he hoped to be able to prove that Dempsey had lied in his testimony during the trial with respect to the question of whether Assistant United States Attorney Moore had promised leniency to him. (A. 138). He also indicated he had "some very valuable information." (A. 139).

On June 8, 1972 Lucchetti again wrote, requesting that Achenbach visit him. On June 14, 1972, Agents Achenbach and Long again visited Lucchetti, and Lucchetti again complained about inhumane conditions at the Suffolk County Jail. The Agents' report states that, during the course of the interview, the following occurred:

> "He [Lucchetti] stated however that he requested the interview not because of a civil rights complaint but because he felt that he could furnish information concerning crimes in which the government had an interest in return for consideration in a possible shorter sentence on his part." (A. 141).

Lucchetti alleged that he possessed information concerning a prominent citizen of Suffolk County and indicated he would be aggreable to an interview with the United States Attorney (A. 141).

On June 20, 1972, Lucchetti again wrote to Achenbach, requesting an interview (A. 142). On June 26, 1972, Agents Achenbach and Long interviewed him. He again complained about conditions at the Jail and allegedly "indicated a desire to cooperate in matters of interest to the government in return for possible favorable considerations." (A. 143).

On June 27, 1972 he again wrote to Agent Achenbach, requesting an interview. On July 17, 1972, Agent Long visited Lucchetti and told him that an interview had been arranged with Assistant United States Attorney Moore. At that time, Lucchetti allegedly volunteered "in a hypothetical manner" that he possessed information concerning several criminal activities (A. 145).

On July 21, 1972, Assistant United States Attorney Moore interviewed Lucchetti, apparently in the presence of Agent Long, and asserted that he possessed significant information with respect to illegal activities. Agent Long's report states:

> "Lucchetti questioned Mr. Moore as to what could be done for him if he desired to cooperate with the Federal government. Mr. Moore stated that he could not make him any promises but that if he did desire to cooperate his cooperation would be called to the attention of the United States District Court in the Eastern District of New York, and to the United States Board of Parole." (A. 146).

On July 26, 1972 Lucchetti again wrote to Agent

Achenbach, requesting an interview (A. 147). On August 3, 1972, Agents Long and Achenbach visited Lucchetti at the Suffolk County Jail. During the course of that interview, Lucchetti allegedly admitted that he and others had participated in the March 9, 1970 armed robbery of the First National Bank of Bayshore. He also allegedly stated that he had known a certain attorney since 1965 and that in 1969 he told the attorney of his intention to commence perpetrating bank robberies in Suffolk County. The attorney allegedly told Lucchetti that he should be selective in choosing his confederates. Thereafter, the attorney agreed to "wash" the proceeds of Lucchetti's intended bank robberies. Thereafter, Lucchetti allegedly engaged in a series of bank robberies in 1970 and the attorney did, in fact, "wash" the proceeds by exchanging "good" money for the stolen money in return for a percentage (A. 148-157). Similar interviews were conducted on August 8, 1972 (A.158-165), August 14, 1972 (A. 166-169), August 25, 1972 (A. 170-172), September 6, 1972 (A. 173-174). During each of these interviews, Lucchetti allegedly confessed to various bank robberies, inculpated the attorney in the "washing" of money and in various other illegal and unethical activities, and gave information concerning other alleged criminals.

On September 9, 1972, Lucchetti's wife contacted Agent Long and stated that her husband wished to be interviewed as soon as possible. (A. 175). Agent Long visited Lucchetti at the Suffolk County Jail, and Lucchetti advised

that individuals named Lawrence Russo and Carmine Santillo had engaged in a series of bank robberies out on Long Island in 1971 and 1972, and that the proceeds of a particular bank robbery had been delivered to a particular person at a particular address a few days prior to the instant interview (A. 176).

On November 27, 1972, Agent Long again interviewed Lucchetti in an effort to learn the whereabouts of the aforementioned bank robbers, but Lucchetti did not have the requested information (A. 178).

On October 3, 1972, Agents Long and Achenbach visited Lucchetti at the Suffolk County Jail, and Lucchetti asked them to arrange for an interview with a Suffolk County District Attorney (A.179).

On October 2, 1972, Agents Long and Wiebke, again interviewed Lucchetti for the purpose of determining whether he had been able to learn the whereabouts of the missing bank robbers. Lucchetti advised that he had not (A. 180).

On October 4, 1972, in the presence of Agent Long, Lucchetti was interviewed by a Suffolk County District Attorney and inquired as to "what could be done for him" in the event that he decided to provide information to the Suffolk County authorities (A. 181).

On October 4, 1972, Lucchetti gave Agent Long additional information concerning the missing bank robbers. On October 7 he wrote to the F.B.I. requesting assistance with respect to alleged violations of his civil and constitutional

rights (A. 183). This appears to have been one of several letters received at the same time from various Suffolk County Jail inmates protesting about inhumane treatment (A. 184). An F.B.I. report indicates that Lucchetti admitted to Agent Achenbach that he had instigated these complaints in an effort to harrass Jail officials.

On October 12, 1972, Agents Long and Achenbach again interviewed Lucchetti at the Suffolk County Jail, and Lucchetti again discussed his hope of establishing that Dempsey had lied with respect to the question of whether the government had made any promises to him (A. 186).

On October 19, 1972, Lucchetti was called to testify before a grand jury in the United States District Court for the Eastern District of New York. He was questioned by Assistant United States Attorney Emmanuel Moore. (A. 187). After being advised of his rights* (A. 188-190), and after signing a "waiver of immunity" form (A. 191), Lucchetti testified at length with respect to the aforementioned attorney's involvement in the "washing" of bank robbery proceeds (A. 191-201).**

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* Most of the F.B.I. reports discussed supra, indicate that Lucchetti was advised of his rights, stated that he understood his rights, and that he did not wish to exercise his rights.

** The attorney in question was the same attorney who had represented Lucchetti at the trial which led to his conviction before Judge Mishler (A. 201).

2. The Suppression Hearing Before Judge Mishler.

The government's first witness at the suppression hearing was F.B.I. Agent Long, who had been the case agent at the first trial and who had been present at the various interviews with Lucchetti. In substance, Agent Long's testimony followed the F.B.I. reports described supra. In addition, he made it clear that he believed that the information which had been given by Lucchetti had been accurate and truthful (May 2, 1975 at pp. 89, 90-93), in various respects was corroborated by another available witness (Id., at p. 47), and that Lucchetti's information was of value (Id., at pp. 87-8).

The second government witness was former United States Attorney Moore (May 5, pp. 114-223). Moore admitted that he had promised that in return for Lucchetti's cooperation, Moore would make that cooperation known to the trial judge (in connection with a motion for reduction of sentence) and to the United States Board of Parole (in connection with an application for parole - for which Lucchetti was immediately eligible) (May 5, 1975, at pp. 125, 126, 149; W. 69). Moore denied making any other promises to Lucchetti (May 5, 1975, at p. 127; May 9, 1975 at p. 367; W. 68). It was Moore's "subjective intent" not to prosecute Lucchetti for any admissions he might make (since Lucchetti was already under a twenty year sentence), but, according to Moore, he never communicated that fact to Lucchetti (May 5, 1975, at

p. 137-8).

Prior to the hearing, H. Elliot Wales, Lucchetti's attorney, interviewed Moore for the purpose of preparing motion papers directed to a suppression of any admission Lucchetti may have made (A. 116). When questioned about that interview, Moore denied that he ever told Mr. Wales that he had assured Lucchetti that Lucchetti would never be prosecuted based upon any admissions he might make (May 9, 1975, at p. 358). Later in the hearing, Mr. Wales testified as a defense witness. Mr. Wales unequivocally testified: "Mr. Moore told me that he had told Mr. Lucchetti that he had no intention of ever using his grand jury testimony against him." (May 9, 1975, p. 273-276).*

Mr. Moore admitted that he never followed through on his promise to Lucchetti that he would notify the trial judge and the Parole Board (May 5, 1975, at pp. 139, 150-1, 170; see also: testimony of Agent Long, May 2, 1975 at p. 85). In contradiction to the testimony of Agent Long, Moore asserted that his reason for not following througn on his promise was that he believed that Lucchetti's apparent

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* Significantly, despite the fact that Mr. Moore's testimony was impeached in several respects during the course of these proceedings, Judge Mishler chose to cast several pointed aspersions upon the veracity of Mr. Wales (May 9, 1975, p. 288, 355, 378).

cooperation was merely an example of conniving and of creating delaying tactics (May 5, 1975, p. 139), and that Lucchetti's testimony was not reliable (id. at p. 140), and that Moore believed Lucchetti's testimony to be untrue (id. at p. 145) and that Lucchetti's testimony was merely an example of dupping the government (id. at p. 155), and that his cooperation was not valuable (id., at p. 177). However, as admitted by Moore, Lucchetti's conversations with the government yielded the return of $8000 of bank robbery proceeds from a robbery which occurred while Lucchetti was in jail (May 5, 1975, at p. 128-9; see also: testimony of Agent Long, May 2, 1975, at pp. 67-73).

Incredible as it may sound, when Mr. Moore was subsequently called as a trial witness, he completely reversed his position with respect to Lucchetti's veracity during the period of apparent cooperation with the government. Under cross-examination by the defendant, pro se, Moore testified as follows:

> "Q. In your opinion did I testify truthfully in reference to Mr. Rohl's participation in any alleged activity?
>
> "A. I could say this: with respect to my opinion, as to whether you testified truthfully as to Mr. Rohl, at the time, I believed you at the time and I also believed your participation in the bank robbery to which you testified to in the grand jury.
>
> "Q. And how come Mr. Rohl was never indicted?
>
> "A. Because we did not have sufficient corroborative evidence at the time.
>
> "Q. In other words, you didn't believe my story?

"A. I believed your testimony.***
I believed at the time you were testifying
in the grand jury that what you were saying
was true because you were quite clear as
to details and your participation in the bank
tobbery and your details with respect to Mr.
Rohl." (W. 481-2).

When it was the defendant's turn to present evidence at the hearing before Judge Mishler, Judge Mishler refused to issue subpeonas for various witnesses which the defendant wished to call. The defendant offered to prove through these witnesses that the complaints alleged in his civil rights applications to the F.B.I. had, in fact, been genuine, and that, during the period of the interviews with the F.B.I. Agents, the defendant was under substantial emotional and physical strain due to the inhumane conditions to which he was subjected at the Suffolk County Jail. Judge Mishler refused to issue such subpeonas unless the defendant would first testify in his own behalf. The defendant refused to do so, and Judge Mishler terminated the hearing and declined to suppress the alleged admissions (May 9, 1975, p. 374-6).*

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* Several times during the hearing, the Court sought to pressure Lucchetti into waiving his right against self-incrimination (e.g., May 8, 1975, p. 264; May 9, 1975, pp. 309, 374). Additionally, the defendant made several efforts to persuade the Court that the witnesses in question ought be subpeonaed (e.g., May 8, 1975, pp. 229 et seq.). Further illustrative of the difficulties placed upon the defendant by the Court was the refusal of the Court to provide the defendant with the transcripts of prior proceedings in this case (at which many of the same witnesses testified), and with the daily transcript of the hearing which was in progress (May 5, 1975, at p. 217). As already noted, the defendant did call Mr. Wales (W. 269-277). He also called Henry J. Boitel, the attorney who had represented

[footnote continued on following page]

3. The Continuation of the Suppression Hearing Before Judge Weinstein.

Following the declaration of a mistrial before Judge Mishler, the case was transferred to Judge Weinstein. Judge Weinstein granted Lucchetti's motion to reopen the suppression hearing, and Lucchetti testified in his own behalf (W. 11, et seq.). In his testimony, he revealed that during the period of January 25, 1972 through all of the time covered by the F.B.I. interviews and his own grand jury testimony, he was in the Suffolk County Jail and was subjected to horrendous treatment. Thus, he was frequently placed in detention cells, including a particular cell called "the hole". He had the distinction of being one of only two people ever subjected to incarceration in the "hole". This had earlier been verified by Agent Achenbach (May 9, 1975, p. 349). It appears as though when Lucchetti was not being subjected to this type of punishment, he was in the hospital (W. 11-14; 20, 24-25). Even when in the hospital, he was handcuffed by legs and arms in a spread-eagle position for two days on

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[footnote continued from previous page]
him in the appeal from his prior conviction and had filed a petition for a writ of certiorari and a motion for a reduction of sentence in Lucchetti's behalf. Mr. Boitel confirmed that no representative of the government had communicated with him concerning their desire to interview Lucchetti or concerning any interviews that were actually in progress. In short, he had no knoweldge of the fact that Lucchetti was cooperating (May 9, 1975, p. 277-298). Agent Achenbach was also called as a witness and, in substance, followed the recitals of the F.B.I. reports (May 9, 1975, at p. 298-355).

a hospital bed (W. 39). (See also: W. 41 concerning the "hole"; W. 47, concerning Lucchetti's six months in isolation where he had to eat his meals using a toilet bowl as a table).

Aside from Lucchetti's physical circumstances, it appears that the Suffolk County authorities refused to send out his mail, even when that mail was directed to the United States District Court for the Eastern District of New York, the President of the United States, the Civil Rights Bureau of th e Department of Justice, the Attorney General of the United States, etc. (W. 14-15).

With respect to Lucchetti's several, above recited complaints, he also requested that Judge Weinstein issue subpeonas for the production of various witnesses to the truth of his testimony. Judge Weinstein responded that such additional testimony was not necessary since the Court would accept Lucchetti's statement as to those facts (W. 51-53). Lucchetti also offered to take a polygraph test with respect to all of his testimony, and Judge Weinstein denied that request (W. 34, 36, 43, 53).

It is, thus, clear that the circumstances under which Lucchetti came to meet with the F.B.I. agents were in fact characterized by severe deprivations of fundamental civil and human rights. We turn, then, to Lucchetti's version of his dealings with the government under these circumstances.

At every one of the interviews that he had with the F.B.I. agents, they would say, "Why don't you help yourself, Charlie? Why don't you come on our side? Why

don't you talk to Manny Moore? Get a sentence reduction. We'll get you this. Help yourself. Tell us about this, tell us about that, tell us about that." (W. 28).

Further, according to Lucchetti, Mr. Moore unequivocally promised him that if he cooperated with the government Moore would see to it that Lucchetti would actually receive a sentence reduction, and Moore promised that nothing Lucchetti revealed would ever be used against him (W. 28-34). He also asserted that the F.B.I. agents and Moore told him not to discuss the fact of the interviews with any attorney (W. 35).

At the conclusion of the hearing before Judge Weinstein, Judge Weinstein stated that he had read Judge Mishler's memorandum during the prior suppression hearing and that "nothing that has been said here would lead me to believe that any decision of his would be changed in the slightest. There is simply no basis for a motion to suppress here." (W. 72).

Argument

POINT I

THE DEFENDANT WAS DEPRIVED OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AND HIS SIXTH AMENDMENT RIGHT TO COUNSEL, AS WELL AS HIS RIGHT TO DUE PROCESS OF LAW, WHEN THE DISTRICT COURT ADMITTED INTO EVIDENCE ALLEGED ADMISSIONS OF THE DEFENDANT.

A. At the Time that the F.B.I. Agents and the United States Attorney Secured the Alleged Admissions From the Defendant, Both of Them Well Knew or Should Have Known, as Found by the District Court, that the Defendant's Conviction had Been Secured in Violation of his Constitutional Right to the Disclosure of Information Which Would Have Been of Value to the Defense. It is Thus Clear that the Defendant's Entry into Negotiations With the Prosecution was the Direct Result of this Primary Illegality.

Assistant United States Attorney Moore and F.B.I. Agent Long were, respectively, the prosecutor and the case agent at the defendant's trial herein. Moore and Long participated, together, in the conference, which preceded the first trial, in which Jack Dempsey was promised consideration in return for his testimony against the defendant. When Judge Mishler set aside the conviction, he found that "Assistant United States Attorney Moore knew, or should have known, that Dempsey's answers to the questions concerning the understanding between him and the government were false." (A. 105). The same conclusion necessarily applies to Agent Long. It follows that when Agent Long, and then Mr. Moore, entered into discussions with Lucchetti, they continued to know or should have continued to know that he had been convicted upon false testimony. Their obligation to reveal that fact was a continuing obligation.

On June 5, 1972, when Agent Long interviewed Lucchetti at the Suffolk County Jail, Lucchetti had not yet commenced making any admissions. As noted in the F.B.I. report, during the course of the interview, Lucchetti stated that he hoped to be able to prove that Dempsey had lied in his testimony during the trial with respect to the question of whether Assistant United States Attorney Moore had promised leniency to him (A. 138). Long should have recognized his continuing obligation and should have revealed the truth to Lucchetti. He did not do so. Additionally, when, in June, 1972, Moore was advised of the commencement of conversations with Lucchetti, Moore had a similar obligation. He, too, failed to fulfill his obligation.

There can be no doubt in the world that Lucchetti's sole objective in making any admissions to the government was in the hope of some way lessening the burden of the twenty year sentence which had been imposed upon him. Unbeknownst to him, the judgment, of which that sentence was a part, should never have been entered. Were it not for that tainted judgment, there would have been no admissions.

We submit, therefore, that by two distinct routes, the government's failure to reveal the suppressed evidence rendered the resulting admissions inadmissible.

1. If psychological coercion is used in obtaining a confession, it can render the confession

involuntary, notwithstanding the fact that the interrogating agent went through the perfunctory ritual of advising the defendant as to his rights, Gorman v. United States, 380 F. 2d 158 (1st Cir., 1967); Colombe v. Connecticut, 367 U.S. 568. As was stated in Miranda v. Arizona, 384 U.S. 436, at 476:

> "***Moreover, any evidence that the accused was threatened, tricked or cajoled into a waiver, will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."

An examination of the instant situation must lead to the conclusion that the improperly present coercive effect of the existing judgment constituted an unconstitutional invasion of his Fifth Amendment privilege.

2. Viewed from a somewhat constitutional perspective, the defendant's admissions were the direct result of the "primary illegality" involved in the suppression of evidence at trial. In Silverthorn Lumber Co. v. United States, 251 U.S. 385 (1920), Justice Holmes, speaking for the Court, said:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source

> they may be proved like any others, but the knowledge gained by the government's own wrong conduct cannot be used by it in the way proposed." (251 U.S. at 392) [Emphasis added]

In Fahy v. Connecticut, 375 U.S. 85 (1963), the Court held that a confession induced by the use of illegally seized evidence is inadmissible.

In Napua v. Illinois, 360 U.S. 264, 269 (1959), the Court articulated the affirmative duty of the prosecution to correct the false testimony given by a prosecution witness at trial. It said:

> "...[I]t is established that a conviction obtained through the use of false evidence, known by representatives of the state, must fall under the Fourteenth Amendment [citations omitted]. The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears [citations omitted]."

Lucchetti's alleged admissions flowed directly from the failure of a government attorney and of a government agent to abide by the rule enunciated in Napua, supra. His subsequent reconviction flowed directly from the illicitly obtained admissions.*

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* Significantly, two of the three jury requests for the rereading of testimony or for other information concerned Lucchetti's alleged admissions. (W. 656-658).

B. The Facts Reveal that the Defendant's Alleged Admissions Were Made Under Circumstances Which Led Him to Believe That They Would Never be Used Against Him, but Would Only be Used in Connection with a Motion for a Reduction of Sentence.

As indicated in our Statement of Facts, supra, there is a clear conflict between Lucchetti and his government interrogators with respect to whether there had been an explicit promise that his admissions would never be used against him. It is respectfully submitted, however, that such a promise was implicit under the circumstances. Thus, Assistant United States Attorney Moore admitted that it was his own "subjective intent" not to use any of Lucchetti's admissions against him (May 5, 1975, at pp. 137-8; May 9, 1975, at p. 358). The total relationship amongst the parties only makes sense within the context of such an implicit agreement.

Lucchetti repeatedly asserted to the agents his anticipation of uncovering evidence which would overturn his conviction. Could they have properly understood him to believe that if he were successful in such an effort his admissions might be used to reconvict him of the same crime and, perhaps, of many additional crimes? To state the proposition is to demonstrate its absurdity.

The burden of establishing a waiver by the accused of his right to remain silent and of his right to counsel is on the prosecution. It is based on the rule that the waiver of a constitutional right will not be lightly inferred. Johnson v. Zerbst, 304 U.S. 458. This rule applies

to in-custody interrogations, as was here the case, and "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Miranda v. Arizona, 384 U.S. 436 at 475.

We respectfully submit that the defendant necessarily had at least the same subjective perception of the situation as Mr. Moore. He was aware of the necessity for the giving of the warning ritual. He was, no doubt, also aware that the prosecution was probably giving him that ritual for the purpose of enhancing his credibility if it should later become necessary for him to testify in the prosecution of persons about whom he was giving information.

Regardless of whether the promise not to prosecute Lucchetti was implicit or explicit, it was, nevertheless, actual. For that reason, it was violative of due process for his admissions to be used against him.

C. The Alleged Admissions Were Made Pursuant to a Clear Agreement that the Defendant's Cooperation Would be Fully Revealed to the District Judge, and the Government Failed to Fulfill its Promise in that Regard.

There is absolutely no doubt that, in return for Lucchetti's admissions, Mr. Moore promised that Lucchetti's cooperation would be made known to the trial judge (in connection with a motion for a reduction of sentence) and

to the United States Board of Parole (in connection with an application for parole, for which Lucchetti was immediately eligible) [May 5, 1975, at pp. 125, 126, 149; W. 69]. Mr. Moore never fulfilled that promise to the slightest degree (May 5, 1975, at pp. 139, 150-1, 170; See also: testimony of Agent Long, May 2, 1975, at p. 85).

Lucchetti provided the government with a very substantial amount of information concerning the commission of serious crimes. Those crimes involved many unsolved bank robberies, large scale money washing by a prominent attorney, together with numerous other criminal activities by that attorney, including subornation of perjury, and a variety of other tips and leads. Lucchetti also directed the government to another individual (Santoro) who was able to corroborate certain of Lucchetti's information (May 2, 1975, at p. 47). Finally, Lucchetti secured for the government the return of some $8000 which had been the product of a bank robbery in which he, himself, had not been involved (May 5, 1975, at p. 128-9; See also: testimony of Agent Long, May 2, 1975, at pp. 67-73).

Agent Long made clear that he believed Lucchetti to have been truthful in the information he supplied and that Lucchetti's information was of value (supra, p. 18).

During the hearing, Mr. Moore attempted to excuse his failure to fulfill his promise to Lucchetti upon the ground that Lucchetti's cooperation had not been of value and upon the further ground that he believed Lucchetti's

claims to be untrue (supra, pp. 19-20). However, when it came time to testify at Lucchetti's second trial, Mr. Moore almost sounded like a character witness in attesting to his belief in the truth of the information provided by Lucchetti (supra, pp. 20-21).

Any fair interpretation of the facts must lead to the conclusion that Mr. Moore utterly failed to live up to the promise which had induced Lucchetti's admissions in the first place. Fundamental fairness requires that such tactics by a prosecutor cannot be tolerated. Since the prosecution did not live up to its end of the bargain, it should have been estopped from utilizing against Lucchetti the information which had been induced by the bargain.

D. The Totality of Circumstances Surrounding the Admissions of the Defendant Were So Coercive as to Require the Exclusion of Those Admissions From Evidence.

As noted supra, if psychological coercion is used in obtaining a confession, it can render the confession involuntary notwithstanding the fact that the interrogating agent went through the perfunctory ritual of advising the defendant as to his rights.

When the defendant testified in the continued hearing before Judge Weinstein, it was established that prior to and during the period that he was making admissions to the government he was being subjected to brutally inhumane treatment at the Suffolk County Jail (supra, pp. 22-23). His sincerity in giving the Court the facts with respect

to that treatment is demonstrated by his repeated offer to the Court to take a lie detector test (supra, p. 23). Although Lucchetti was denied the opportunity to call witnesses from the Suffolk County Jail to document the coercive conditions to which he had been subjected, Judge Weinstein appears to have avoided the necessity for the production of those witnesses by assuring Lucchetti that he accepted these allegations as true (W. 51-53). They should, therefore, for the purpose of this appeal, be accepted as true.*

In Watts v. Indiana, 338 U.S. 49 (1949), the Supreme Court observed: "There is torture of mind as well as body; the will is as much effected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men." 338 U.S. at 52.

In Ashcraft v. Tennessee, 322 U.S. 143 the Court held that the circumstances under which an individual is interrogated may be "so inherently coercive that

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* In this connection, it should be noted that prior to his first trial, his roommate at the Federal House of Detention appears to have been homicidal. In the middle of the night, the inmate slashed Lucchetti with a razor inflicting wounds which included a seven inch slash on the side of his face. A report of that incident is set forth in Lucchetti's brief on appeal to this Court from that first conviction (United States v. Lucchetti, Docket No. 72-1210, Brief for Appellant, at pp. 18-19). It is little wonder that the combination of the slashing incident, his treatment at the Suffolk County Jail, and the prospect of many more years of imprisonment, rendered Lucchetti particularly susceptible to an involuntary waiver of his rights.

its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear." 322 U.S. at 154. See also: Leyra v. Denno, 347 U.S. 556 (1954); Spano v. New York, 360 U.S. 315 (1959); Columbe v. Connecticut, 367 U.S. 568 (1961); Lynumn v. Illinois, 372 U.S. 528 (1963); Clewis v. Texas, 306 U.S. 707 (1967).

In Chambers v. Florida, 309 U.S. 227 (1940), and Payne v. Arkansas, 356 U.S. 560 (1958), it was held that a fear of mob violence outside of jail can have an improperly coercive effect upon a defendant and required the exclusion of his confession from evidence. In the present case, as made clear by the defendant's testimony, his problem was an equivalent one - except that the threat came from within the jail.

It is respectfully submitted that, under the totality of the circumstances, the defendant's confession was the product of his coercive environment and should have been excluded as being involuntary. That conclusion is further compelled when it is realized that the government utterly failed to contact the attorney who was then representing Lucchetti with respect to the appeal from the existing judgment of conviction.

POINT II

THE ISSUE OF THE VOLUNTARINESS OF ADMISSIONS MADE BY THE DEFENDANT WAS NOT PLACED BEFORE THE JURY IN COMPLIANCE WITH 18 U.S.C. § 3501.

18 U.S.C. § 3501 (a), which relates to the admissibility of confessions in Federal criminal trials, provides as follows:

> "(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in §§ (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. [Emphasis added].

In United States v. Burnett, 495 F. 2d 943 (D.C.Cir, 1974), the following situation was presented:

> "***The [court's] charge [to the jury] made no mention whatever of the admission to Officer Schleig, and defense counsel neither requested the court to instruct the jury on that matter nor objected to its failure to do so. We are mindful of the general rule that '[n]o party may assign as error any portion of the charge or ommission therefrom unless he objects thereto before the jury retires. ...' It is equally clear, however, that we may overlook a lack of objection where the defect in the instructions amounts to plain error effecting substantial rights

> of the accused. In view of the unequivocal statutory mandate [18 U.S.C. § 3501 (a)] that an instruction be given as to the weight which might be accorded a confession or admission received in evidence, the omission of the instruction in this case was error of the plainest sort.***"

An examination of Judge Weinstein's charge to the jury fails to disclose any instruction in compliance with the "unequivocal statutory mandate" of 18 U.S.C. § 3501 (a). Since Lucchetti's admissions were central to the government's proof in this case, there can be no doubt that the defendant was prejudiced by the failure of the trial judge to so charge.

As Judge Weinstein has said in a different context:

> "The defendant is, of course, entitled to introduce evidence and argue on the issue of coercion as an element of lack of probative force. This is true whether or not the Massachusetts doctrine is followed. If the defendant's theory is based upon this concept of probative force then he is entitled to a charge on this ground." Weinstein's Evidence, § 104 [07] [at p. 104-51].

POINT III

JUDGE MISHLER'S DEMONSTRATED PREJUDICE AGAINST THE DEFENDANT REQUIRED THAT THE DEFENSE MOTION FOR A RECUSAL SHOULD HAVE BEEN GRANTED. THE FAILURE TO GRANT THE MOTION DEPRIVED THE DEFENDANT OF DUE PROCESS OF LAW AND RENDERED THE PRE-TRIAL SUPPRESSION HEARING INVALID.

At the outset of the proceedings which led to the vacation of the initial judgment of conviction,

Lucchetti moved for the disqualification of Judge Mishler from presiding in any future proceedings in this case (A. 35, 36-7). Judge Mishler apparently denied the application for disqualification since he eventually vacated the prior conviction and granted the defendant a new trial.

Thereafter, Lucchetti appears to have renewed his motion that Judge Mishler disqualify himself from further proceedings. Judge Mishler denied the application in an opinion (A. 205-208).

In Gregg v. United States, 394 U.S. 489 (1969), the Supreme Court ruled that it was error for a judge to view a defendant's pre-sentence report prior to conviction. Acknowledging his familiarity with the defendant's case and with his probation report, Judge Mishler distinguished Gregg on the ground that Gregg did not involve nor contemplate retrials before the same judge. (A. 206-208).

As the hearing with respect to the admissions proceeded, Lucchetti reasserted his application for the disqualification of Judge Mishler (May 5, 1975: pp. 217, 218; May 8, 1975, p. 241, 255, 258, 265). Although Lucchetti filed a notice of appeal to this Court from Judge Mishler's denial of the disqualification motion, he proceeded with the hearing anyway (A. 220; May 8, 1975, p. 241).

One would be hard pressed to find more evidence of a judge's prejudice against a defendant than is demonstrated in the history of these proceedings. I can be anticipated that the government will claim that Judge Mishler's

vacation of the prior conviction demonstrates the contrary. That claim cannot withstand analysis. The § 2255 motion was in major part prompted by the discovery of a statement made by Judge Mishler to the defendant Dempsey, indicating an awareness of a promise made by the government to Dempsey (supra, p. 10-11). Judge Mishler's comment was "I just want you to know that the United States Attorney has fulfilled his promises." (A. 95). The issue of whether there had been a promise was, therefore, one which had to be confronted. During the course of the consequent proceedings, Dempsey's former Legal Aide attorney, a witness to such a promise, appears to have communicated his knowledge to an assistant United States Attorney who, in turn, communicated that information to Judge Mishler in writing. (A. 98). As Judge Mishler recognized, this revelation turned the tide and necessarily led to the vacation of the judgment (A. 98, et seq.).

That Judge Mishler called this information to the attention of the defense, means he's honest; it does not mean he's not prejudiced.

Perhaps the most concise statement of Judge Mishler's attitude toward Lucchetti is best provided by Judge Mishler, himself. When Assistant United States Attorney Moore applied for an adjournment of the argument of the motion, Judge Mishler responded as follows:

> "***I am going to express something that is going to be disappointing to both the United

States Government and to Mr. Boitel.

> "Under no circumstances will I reduce this sentence. I regard Mr. Lucchetti as one of the most dangerous criminals that ever appeared before me in this courtroom. I don't care if he can give you information that can locate Mr. Russo or not.
>
> "If Mr. Lucchetti wants any help at all he'll go to the Parole Board. I won't help him at all. I think it's most unfortunate that the wife has to suffer. I think our society would be safer if they keep Mr. Lucchetti behind bars. I wouldn't want to have him as my neighbor." (A. 32-3).

Judge Mishler's prejudice was further demonstrated repeatedly during the course of the confession hearing. He continually lectured Lucchetti that he knew Lucchetti from A to Z, and effectively accused Lucchetti of being a fake and a coward. Moreover, he repeatedly taunted Lucchetti to waive his right against self-incrimination (May 5, 1975: pp. 217, 218; May 8, 1975, pp. 241, 255, 258, 265; May 8, 1975, pp. 229, et seq., 264; May 9, 1975, pp. 309, 374-6).

Judge Mishler's prejudice apparently extended to anyone who might take Lucchetti's side in the matter, including a member of the Bar. Thus, when the testimony of H. Elliot Wales, Esq., contradicted that of former Assistant United States Attorney Moore, Judge Mishler had no qualms about casting aspersions upon the credibility of Mr. Wales - after Mr. Wales left the courtroom (May 9, 1975, at pp. 288, 378). When it is considered that it was Mr. Moore who knowingly suppressed evidence at the first trial, who wilfully failed

to fulfill the bargain he had made with the defendant, and who continually changed his testimony with respect to the facts, one must conclude that Judge Mishler's approach to the matter was hardly objective.

It was not for Judge Mishler to make the determination as to whether he was, in fact, prejudiced. Berger v. United States, 255 U.S. 22 (1921); Action Realty Co. v. Will, 427 F. 2d 843, 844 (7th Cir., 1970); United States v. Roca-Alvarez, 451 F. 2d 843, 847-848 (5th Cir., 1971); Rosen v. Sugarman, 357 F. 2d 794, 797 (2d Cir., 1966); Wolfson v. Palmieri, 396 F. 2d 121, 124 (2d Cir., 1968).

As was stated in Action Realty Co. v. Will, supra:

> "We would add to the foregoing salutary pronouncements that no doubt some judges, even though not biased or prejudiced, have denied motions for a new judge simply because of a feeling that to grant the motion could be construed to be an admission of the non-existent ground for disqualification.
>
> "This motivation, we feel, should never deter a judge from granting the motion if the overall administration of justice, and the needs of the particular litigation are improved thereby. This is the same basic policy which precludes the entering of a compromise and settlement as being considered an admission of liability." (427 F. 2d at 845).

The Code of Judicial Conduct, as promulgated by the American Bar Association, provides in pertinent part, as follows:

> "C. Disqualification.
>
> "(1) A judge should disqualify

himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;"

As this Court said in Winters v. Travia, 495 F. 2d 839, 842 (2d Cir., 1974):

"Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it."

See also: People v. Savvides, 1 N.Y. 2d 554, 556.

28 U.S.C. § 455 [as amended December 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1609] provides as follows:

"(a) Any justice, judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

(3) Where he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

* * *

"(e) No justice, judge ... shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in § (b). Where the ground for disqualification arises only under §§ (a)

> waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

It is clear that the above noted statute places an affirmative obligation upon a District Judge to disqualify himself when any of the noted circumstances are present. We respectfully submit that the record in this case demonstrates that all of the noted circumstances were present.

Since Judge Mishler did not disqualify himself with respect to the confession hearing, those proceedings should be declared a nullity, and this Court should remand this case for a hearing, de novo.

The error of which we complain was not cured by the fact that Judge Weinstein reopened the suppression hearing. Our review of the record does not indicate that Judge Weinstein reviewed the transcript of the suppression hearing. (In any event, a mere reading of the cold transcript would hardly have been a sufficient basis for the making of factual findings with respect to credibility). To the contrary, Judge Weinstein explicitly relied upon Judge Mishler's prior findings:

> "I reread Judge Mishler's full Memorandum of Decision and Order of May 12, dealing specifically with this problem of suppression as well as his memorandum of May 12th dealing with other motions made by the defendant.
>
> "Nothing that has been said here would lead me to believe that any decision of his would be changed in the slightest; ***" (May 19, 1975, p. 72).

Since the proceedings before Judge Mishler should be declared a nullity and since Judge Weinstein utilized Judge Mishler's findings as a starting point, Judge Weinstein's factual conclusions should also be declared fatally tainted.

POINT IV

THE DEFENDANT WAS WRONGFULLY DEPRIVED OF HIS RIGHT TO SUBPEONA WITNESSES AND DOCUMENTS.

The Sixth Amendment of the United States Constitution provides, inter alia, that every defendant in a criminal case shall "have compulsory process for obtaining witnesses in his favor".

During the confession hearing, Judge Mishler not only denied that right, but conditioned the possible allowance of the right upon the defendant waiving his right against self-incrimination and first testifying in his own behalf (May 8, 1975, pp. 229, et seq.; May 9, 1975, p. 374-6).

When Lucchetti sought to exercise that same right before Judge Weinstein during the continued confession hearing, it was again denied to him (W. 47-53)*.

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* Judge Weinstein indicated, as we read the record, that he would accept Lucchetti's allegations as being true without the need for calling witnesses. If Judge Weinstein followed through on that promise, it is not demonstrated with respect to his failure to find that Lucchetti was questioned under coercive circumstances (supra, p. 24).

The defendant respectfully claims that the denial of the subpeona power to him was arbitrary, without proper cause, and prejudicial. It infected the legitimacy of both the hearing and the trial, prevented the defendant from making proper preparation, and effectively rendered him helpless. High plight was multiplied by virtue of the fact that he was incarcerated throughout the hearings and the trial.

POINT V

THE PROSECUTOR IMPROPERLY PLACED HER OWN CREDIBILITY IN ISSUE DURING HER SUMMATION TO THE JURY.

During cross-examination, Dempsey admitted that he had read the transcript of testimony which he had given at the prior trial (W. 360, 362).

On re-direct examination, the proseuctor asked him:

> "Q. Mr. Dempsey, did you in the meetings you had with me and the meetings you had with Mr. Moore or any other federal official, any law enforcement official, has anyone ever told you what to testify to in court at any time?
>
> "A. No, they did not. All they told me is to tell the truth."(W. 372).

In his summation, the defendant, pro se, argued to the jury:

> "Did Jack Dempsey, or was Jack Dempsey rehearsed when he came into this courtroom. Did he go through a rehearsal in Miss O'Brien's chambers chambers or office?" (A. 604).

The defendant's comment was a perfectly proper

channeling of the jury's attention to a legitimate issue. The comment did not convey any impression that Lucchetti had independent knowledge of the underlying facts.

In her summation, however, the prosecutor argued:

> "In short, it is our position that Mr. Dempsey didn't lie to you. Mr. Williams didn't lie to you. ***
>
> "It means that they are testifying to what happened four years ago. It means that Mr. Williams read less than Mr. Dempsey. It means that the government does not have, did not have secret meetings with these people in my office.
>
> "It didn't mean that we met and I gave them a script to memorize it. No, it means they were both truthful and if we wanted to rehearse them and given them a script, we would have made them consistent in all respects as to what happened." (W. 635-6).

This Court has made abundantly clear that when a prosecutor expresses his personal belief in the guilt of the appellant or as to the truth of the testimony of prosecution witnesses, the defendant is deprived of a fair trial and his conviction must be reversed. The same rule applies when the prosecutor argues facts not in evidence. United States v. Drummond, 481 F. 2d 62 (2d Cir., 1973); see also: United States v. Bivona, 487 F. 2d 443 (2d Cir., 1973); United States v. White, 486 F. 2d 204 (2d Cir., 1973); United States v. LaSorsa, 480 F. 2d 522 (2d Cir., 1973).

It is respectfully submitted that the prosecutor's comments in summation deprived the defendant of a fair trial and require a reversal of his conviction.

POINT VI

THE WITNESSES DEMPSEY AND WILLIAMS WERE IMPROPERLY PERMITTED TO INVOKE THEIR PRIVILEGE AGAINST SELF-INCRIMINATION.

The central factual issue in the case was whether Dempsey and Williams had robbed the bank in question upon their own initiative or whether they had been directed in this undertaking by the defendant.

During cross-examination, Dempsey admitted that he had given contradictory stories to the authorities, following his arrest, with respect to whether Lucchetti was a member of the bank robbery ring (W. 309-333).

In an effort to demonstrate that Dempsey and Williams had their own private bank robbery business during the period in question, the defense cross-examined Dempsey as follows:

> "Q. Did you commit other crimes in Suffolk County with David Williams?
>
> "A. I am not going to commit myself on other crimes.
>
> "Q. Oh, but you did?
>
> "A. I refuse to answer that.
>
> "Q. Did you tell the F.B.I. agents that you committed other crimes?
>
> "A. No.
>
> "Q. Did you tell the F.B.I. agents that you committed a crime in New Jersey?
>
> "A. No.
>
> "Q. Were you ever prosecuted for any

of those other crimes?[*]

* * *

"The Witness: I can answer the question. I never told anything about any crimes that I was committing." (W. 333-4).

When the defense returned to the question of other crimes committed by Dempsey with Williams, Dempsey repeatedly invoked his Fifth Amendment privilege, and the Court authorized him not to answer the questions (A. 345-7).

Essentially the same thing occurred when Williams was called as an obviously adverse witness by the defendant (W. 554-5).

In Rogers v. United States, 340 U.S. 367 (1951), the Supreme Court held that if a witness admits one element of a crime, waiver occurs and will extend to all related questions except those which would substantially increase the possibility of punishment.

In United States v. Cardillo, 316 F. 2d 606 (2d Cir., 1963), this Court reversed a conviction where a government witness had claimed privilege and the testimony of that witness had not been stricken. This Court's rationale was as follows:

"***The answer solicited might have established untruthfulness with

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* The issue of other crimes also, obviously, related to the motivation of the witness to testify for the government in exchange for non-prosecution.

> respect to specific events of the crime charged. It is in this field that the decisions appear to call for the striking of testimony. The ground given is not so much that credibility is involved but that refusal to answer thwarts a fundamental right of the defendant to cross-examine his accusers. The refusal of Friedman to answer falls into this category and for this reason the judgments of conviction against Harris and Kaminsky must be reversed." (316 F. 2d at 612-613).

It is respectfully submitted that the invocation of the privilege by Dempsey and Williams prevented the defendant from establishing before the jury the fact that the two men were independently engaged in their criminal activity and further prevented the defendant from establishing that both men had a substantial motivation to continue testifying in a manner favorable to the government so as to avoid prosecution. It was plain error for the trial court to permit Dempsey's testimony to stand. In addition, given the generally self-inculpatory quality of the testimony that both men had given at the prior trial and at the instant trial, their claim of privilege should not have been sustained.

In United States v. Frank, - F. 2d - (2d Cir., June 27, 1975; slip sheet ops. at 4437), the trial judge had sticken the testimony of a defense witness who exercised his Fifth Amendment rights. For the reasons expressed by this Court, we respectfully submit that the same rationale applies here:

> "***[B]y virtue of Allen's

> refusing to answer (for whatever reason) proper, relevant questions on cross-examination going directly to the heart of his testimony on direct examination, tne direct testimony became hearsay, since not subject to cross-examination, and was therefore properly struck. [citations omitted]

POINT VII

THE GOVERNMENT FAILED TO PROVE THE USE OF A DANGEROUS WEAPON, AS REQUIRED BY 18 U.S.C. § 2113 (d), THE CRIME CHARGED UNDER COUNT II OF THE INDICTMENT.

The indictment was in three counts. The first count merely charged the robbery of the First National Bank of Bayshore (18 U.S.C. § 2113(a). (A. 12). The second Count charged the robbery of the same Bank by the use of dangerous weapons (18 U.S.C. § 2113(d). (A. 12-13). The third count charged a conspiracy to rob the Bank (18 U.S.C. § 371). (A. 13).

Although the defendant was convicted as to all three counts, the Court sentenced him only as to Counts II and III, reasoning that Count I was a lesser included offense of Count II (A. 313). The defendant was sentenced to twenty years imprisonment under Count II and five years imprisonment under Count III, to be served concurrently.

At the instant trial, the government failed to adduce any evidence that the gun which was allegedly used in the robbery was, in fact, operable. He requests that this Court hold that the evidence was insufficient to establish the aggravated form of robbery due to this failure

Certificate of Service

HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York hereby certifies that on September 23, 1975 he served two copies of the Brief in Behalf of the Appellant in the within case upon David G. Trager, Esq., United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, by depositing the same in a post-paid, properly addressed wrapper/in an official depository marked "Special Delivery" within the care and custody of the United States Postal Service within the State of New York.

HENRY J. BOITEL

New York, New York
September 23, 1975